IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

**O R D E R**

M/s Rajasthan Diesels Vs. Radheyshyam

**S.B.CR.MISC. PETITION NO.829/2005**

against the order dt.3.6.2005 passed by Judicial Magistrate, Chittorgarh in Cr.Complaint No.117/2004.

DATE OF ORDER :: September 04, 2006

**PRESENT**

**HON'BLE MR.JUSTICE H.R.PANWAR**

Mr.B.R.Mehta, for the petitioner.

Mr.Ramesh Purohit, for non-petitioner.

**BY THE COURT:**

By the instant criminal misc. petition under section 482 Cr.P.C., the petitioner has challenged the order dt.3.6.2005 passed by the Judicial Magistrate, Chittorgarh (for short 'the trial court' hereinafter) in criminal complaint No.117/2004, whereby the trial court dismissed the complaint filed by the petitioner under section 138 of the Negotiable Instrument Act, 1881 (for short 'the Act' hereinafter) in default.

I have heard learned counsel for the parties. Carefully gone through the order impugned.

The matter was posted to 3.6.2005 for reading over the substance of accusation/charge to the accused-non-petitioner. On 3.6.2005, the accused non-petitioner failed to appear and the counsel representing him filed an application seeking dispensing with the personal appearance of the accused-non-petitioner. The trial court dispensed with the personal appearance of the non-petitioner, however, dismissed the complaint in default since the complainant or his counsel failed to appear when the case was called for.

It is contended by the learned counsel for the petitioner complainant that counsel representing the complainant before the trial court appeared twice before the trial court but the trial court was busy in some other matters and lastly when the matter was called, the counsel for the complainant was busy in some other court and the complaint was dismissed in default. Be that as it may, from perusal of the order impugned, it appears that on the relevant date, the complainant was not to do anything but it was the trial court, who was to read over the substance of the accusation/charge to the accused-non-petitioner and on failure of accused-non-petitioner the matter

could have been adjourned but the trial court instead of adjourning the matter, dismissed the complaint.

In Mohammed Azeem vs. Venkatesh & Anr., **2003 Cr.L.R. (S.C.) 211**,wherein the Apex Court held that the cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint. In that case, the complainant wrongly noted the date for hearing. Due to his absence on one day fixed for trial, the Magistrate dismissed his complaint and acquitted the accused. The order of Magistrate was challenged by way of an appeal under section 378(4) of the Code to the High Court. The High Court dismissed the appeal. The complainant therein carried the matter to the Hon'ble Supreme Court and the Supreme Court having noticed that there was one singular default in appearance on the part of the complainant and, therefore, cause shown by the complainant of his absence, he has wrongly noted the date, has not been disbelieve and it was held that it should have been held to be valid ground for restoration of the complaint. While setting aside the orders of Metropolitan Magistrate and the High Court, the complaint was restored.

Keeping in view the decision of the Hon'ble Supreme Court

in Mohammed Azeem vs. Venkatesh & Anr. (supra), the petition deserves to be allowed.

Consequently, the cr.misc. Petition is allowed. Order impugned dt. 3.6.2005 is set aside and the criminal complaint is restored to its original number. The parties shall appear before the trial court on 08.01.2007. No fresh notice is required to be issued to the parties. Record of the trial court be returned forthwith.

**[H.R.PANWAR],J.**

**m.asif/-**